U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: July 18, 1994
CASE NO. 93-LCA-0004

IN THE MATTER OF

EVA KOLBUSZ-KIJNE,

COMPLAINANT,

v.

TECHNICAL CAREER INSTITUTE,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

Before me for review is the Administrative Law Judge's (ALJ) Decision and Order (D. and O.) issued on October 14, 1993, in this case arising under Section 1101(a) (15) (H) (i) (b) and Section 1182(n) of the Immigration and Nationality Act of 1952, as amended (INA), 8 U.S.C. § 1101 et seq. (1991), and the implementing regulations at 29 C.F.R. Part 507, Subparts H and I (1993).[1] In his D. and O., the ALJ assessed a civil money penalty of $1,000 against Respondent and remanded the complaint to the Administrator of the Wage and Hour Division, Employment Standards Administration (Administrator) for further consideration of whether the Department of Labor (DOL) has any authority to direct a remedy for Complainant in this case.

Pursuant to the provisions of 29 C.F.R. § 507.845(c) (1993), I accepted review of the ALJ's D. and O. to consider the following issues: whether the ALJ, based on the record evidence, erred in determining that the employer committed violations requiring that it be barred from participating in the "H-1B" visa program pursuant to 8 U.S.C. §§ 1101(a) (15) (H) (i) (b), 1182(n), 1184(g) (1) (A), and 1184(i); and whether the relief fashioned by the ALJ was appropriate under the circumstances presented. See Notice of Intent to Review issued Feb. 2, 1994.

[1]The Secretary's regulations are also found at 20 C.F.R. Part 655, Subparts H and I (1993).

Complainant, Respondent, the Administrator, and United Auto Workers, AFL-CIO, Local #2110 (Union) have filed briefs before me on the issues presented for review.[2] Based on a careful review of the record, the ALJ's D. and O. and the parties' briefs, I conclude that Respondent violated the statutory and regulatory requirements governing the filing of labor condition applications for H-1B visas and that such violations must be reported to the Attorney General and the Employment and Training Administration (ETA). Moreover, I find that the applicable provisions of the INA provide no relief to Complainant with respect to her additional allegations that TCI's hiring under the H-1B visa program resulted in her layoff and have adversely affected other U.S. workers at TCI. These conclusions are discussed more fully herein, following a brief review of the instant facts and the governing statutory and regulatory provisions. Because this is a case of first impression before me, the following discussion is intended to clarify the procedural and substantive requirements of the H-1B visa application process and its enforcement.

Procedural History And Facts

Respondent, Technical Career Institute (TCI), is an educational institution which hires teachers of English as a second language (ESU). Complainant was employed by TCI as an ESU teacher for temporary periods from September 1991 until February 1993, when Complainant was informed that she must be laid off because of a decline in enrollment. See Letter from Edward Leff, Vice-President TCI, dated Feb. 16, 1993. The Union represented the bargaining unit to which Complainant and the H-1B workers belonged. Complainant's layoff was governed by the seniority provisions of the collective bargaining agreement between Respondent and the Union.

Complainant filed a complaint with the Wage and Hour Division of the Employment Standards Administration (ESA) of the U.S. DOL dated April 29, 1993, requesting that DOL investigate the certification for H-1B visas for nonimmigrant instructors of ESU at TCI, on the grounds that working conditions of U.S. workers had been adversely affected by the employment of H-1B nonimmigrants. Complainant further stated that,

> "An additional reason for this request lies in the fact that, according to the union shop stewards, to the best of their knowledge the trade union bargaining representative has not been informed about the employment of nonimmigrants when TCI hired them, nor that these positions have otherwise been made available for U.S. workers."

Complainant's letter of April 29, 1993 (attached to Complainant's June 23, 1993 letter to ALJ).

Upon receipt of the complaint letter, the Administrator conducted an investigation and the District Director of Wage and Hour, ESA, issued the Administrator's Determination on June 23, 1993, concluding that TCI was operating in compliance with the H-1B provisions of the INA and attaching copies of the labor condition applications (Form ETA 9035) investigated. The labor condition applications in question were signed and dated by Respondent on January 9, 1992, January

---

[2] The documentary evidence filed before me (submitted as attachments to the parties' respective briefs), which was not presented at the ALJ hearing, is not evidence in the formal record in this case. Additional arguments raised in the parties' briefs before me, however, will be addressed.

12, 1993 and February 19, 1993, and all have marked box (d) (1) indicating that as of that date, notice of the application had been provided to workers employed in the occupations in which H-1B workers would be employed, through notice to the bargaining representatives of these workers. The Union first received documents from TCI concerning applications for H-1B visas in March 1993. CX-1, attachment 4, letter dated July 29, 1993 to Mrs. Kolbusz-Kijne from Union's Recording Secretary; Tr. at 27-28, 97. Respondent met with the Union in November 1991 to discuss anticipated layoffs of ESL teachers, including H-1B nonimmigrants. Tr. at 20.[3]

Complainant timely requested an ALJ hearing which was held on August 10, 1993. The ALJ issued his decision on October 14, 1993, and Complainant, Respondent and the Administrator petitioned for review of the ALJ's D. and O. On December 3, 1993, the Administrator advised the Attorney General of the ALJ's findings, and on January 26, 1994, INS advised that petitions for H-1B visas filed by Respondent would not be approved for a one year period from January 26, 1994 to January 25, 1995.

ALJ's Decision

After the August 10 hearing on this matter, the ALJ found that Respondent failed to comply with the provisions of the INA and the implementing regulations governing the filing of labor condition applications for H-1B nonimmigrant visas. The ALJ concluded that the 3 challenged labor condition applications in evidence each contained a misrepresentation by Respondent, i.e., attestation that the appropriate bargaining representative had been notified of Respondent's filing of the labor condition applications for H-1B nonimmigrants under INA Section 1182(n). Accordingly, the ALJ addressed the issue of civil money penalties pursuant to 29 C.F.R. § 507.810. He excused one of the violations of 29 C.F.R. § 507.805(a) (1), finding that the first labor condition application was filed prior to the effective date of the regulations. He then assessed a civil money penalty of $500 for each of the other two violations. Additionally, the ALJ stated that neither the INA nor the applicable regulations provide a remedy for Complainant's assertion that she was laid off as a result of Respondent's hiring aliens under these flawed labor condition applications, and he remanded the complaint to the Administrator for further consideration of this issue, and also recommended that the statute should be amended in this respect. Finally, the ALJ informed the parties that pursuant to 29 C.F.R. § 507.855, the Administrator would notify the Attorney General and ETA of the finding that Respondent violated the applicable statutory and regulatory provisions.

---

[3] The Union's Brief in Opposition to the ALJ's Decision, dated March 14, 1994, asserts that the Union had "substantial de facto notice of the elements which would have been included in such notices. . . the salaries being paid to the H-1B workers and their working conditions. . . ." In support of this contention the Union has submitted, attached to their brief, a copy of a January 11, 1994 letter from the Union's Recording Secretary to Dr. Leff of TCI. Although the letter tends to support the Union's position, it is not a part of the formal record in this case. In any event, it would not alter my finding on the issue of whether Respondent provided the required notice to the appropriate bargaining representative.

Statute and Regulations

The INA of 1952 was amended in pertinent part on November 29, 1990 (Immigration Act of 1990, Pub. Law 101—649, 104 Stat. 4978), and again on December 12, 1991 (Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. Law 102-232, 105 Stat. 1733). As amended, the statute defines classes off aliens who are not considered "immigrants" under the U.S. immigration law and who may enter the U.S. for prescribed periods of time and for prescribed purposes under various types or classes of visas. 8 U.S.C. § 1101(a)(15).

One such class of noniimmigrant aliens known as "H-1B" are allowed entry into the U.S. on a temporary basis to work in "specialty occupations," or as fashion models of distinguished merit and ability. 8 U.S.C. § 1101(a)(15)(H)(i)(b). Specialty occupations for purposes of obtaining an H-1B visa are defined at 8 U.S.C. 1184(i). This is a limited visa program. The total number of aliens who may be issued H-1B nonimmigrant visas during any fiscal year may not exceed 65,000 and the period of authorized admission as such a nonimmigrant may not exceed 6 years. See Section 1184(g). The Attorney General (INS) has the authority to determine whether an alien satisfies the criteria for entry to the U.S. as a nonimmigrant under § 1101(a)(15)(H). See Section 1184(a) and (c).

Since the effective date of the 1990 Amendments, intending employers are required to file an application (labor condition application) with the Secretary of Labor under Section 1182(n) (1) as part of the process of obtaining an H-1B nonimmigrant visa, for each alien it is petitioning to employ in a specialty occupation. The statute also provides that,

> "Unless the Secretary [of Labor] finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification described in section 1101(a)(15)(H)(i)(b) of this title within 7 days of the date of the filing of the application."

8 U.S.C. § 1182(n)(1). The INA sets out detailed obligations concerning wages and working conditions to be met by intending employers with regard to the H-1B nonimmigrant who is to enter the U.S. to perform services for that employer in a specialty occupation. See 8 U.S.C. § 1182(n) (1) (A).

The Secretary's implementing regulations, found at 29 C.F.R. Part 507, Subparts H and I, set forth the responsibilities of the DOL in administering the labor condition application (LCA) process and enforcement provisions, and delineate the requirements for employers seeking to employ aliens on H-1B visas. 29 C.F.R. §§ 507.700, 507.705, 507.800. Specific guidelines are provided for employers on filing labor condition applications with ETA, the agency responsible for receiving and making determinations on labor condition applications. 29 C.F.R. § 507.700(a)(3), (a)(4), and (b)(1); § 507.730. The Administrator performs the Secretary's duty to investigate and resolve any complaints filed with DOL concerning the labor condition application or the employment of the H-1B nonimmigrant as required at Section 1182(n)(2)(A). 29 C.F.R. § 507.705(a)(2); § 507.800 et seq.

An employer who intends to employ an H-1B alien must submit a completed, dated and signed labor condition application (Form ETA 9035) which contains all required information, including specific labor conditions statements: 1) attestation that it will pay the H-1B aliens the

required wage rates 2) attestation that it maintain the prevailing working conditions, i.e. hours, vacation, fringe benefits (employment of H-1B nonimmigrants will not adversely affect the working conditions of workers similarly employed); 3) attestation that there is no strike or lockout for the occupational classification at intended place of employment of H-1B alien; 4) attestation that it provided notice of the filing of a labor condition application to the bargaining representative of the employees in the occupational classification in which the H-1B nonimmigrants will be employed, or if no bargaining representative, posted notice of filing in conspicuous locations in the area of intended employment. 8 U.S.C. § 1182(n) (1); 29 C.F.R. § 507.730.

The required notice must contain specific details of the application including the number and classifications of nonimmigrant workers, the wages offered arid the period and location of employment, 29 C.F.R. § 507.730(h), and further, notice must have been provided at the time of filing the labor condition application, 29 C.F.R. § 507.730(d)(4).

Merits

The first issue raised before me is whether Complainant had standing to file the instant complaint challenging three labor condition applications filed by Respondent with the intent to obtain, or extend, H-1B nonimmigrant visas for intended employees. Complainant challenged the labor condition applications on the grounds that Respondent misrepresented that it had complied with the notice requirement of the INA. I reject the Union's argument that Complainant had no standing to file this complaint.

Section 1182(n) (2) (A) states that,

> The Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under paragraph (1) or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresen

Here, Complainant was an employee of the employer in the occupational classification and area for which aliens were sought, and the requisite notice was to her bargaining representative. Although investigation may reveal that Complainant suffered no tangible harm from the failure to notify, the regulations make clear that the notice requirement is intended to provide information to the employees in the area where the H-1B nonimmigrants are intended to work. 29 C.F.R. § 507.730(h). Moreover, the regulations require that this notice include a specific statement on the filing off complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application. See 29 C.F.R. § 507.730(h)(1)(i).

The filing of complaints in this scheme is not solely to provide a remedy to the individual aggrieved persons, but to initiate investigations and enforcement by the Administrator where found appropriate to ensure compliance with the law. A broad reading of the relevant statutory language, "any aggrieved person or organization (including bargaining representative)," promotes effective enforcement of the H-1B labor condition application process and helps to achieve the Congressional intent of protecting both U.S. and foreign workers in the H-1B program. See 57 Fed. Reg. 1317, 1323 (January 13, 1992) (Interim Final Rule).

The statute provides that the DOL should review labor condition applications only for "completeness and obvious inaccuracies" and should provide certification within 7 days of the date of filing. 8 U.S.C. § 1182(n)(1). The DOL has promulgated regulations which provide for a simple, expeditious review of labor condition applications, but also implement a complaint driven enforcement system for the protection of workers. This is in compliance with the statutory requirement of establishing a system to conduct investigations to determine whether an employer failed to meet a condition specified in the labor condition application or misrepresented a material fact on its application. 8 U.S.C. § 1182(n)(2). The plain language of the statute and the legislative history of the 1991 amendments to the H-1B provisions, reveal that Congress intended to achieve both of these purposes: streamlined application process and effective complaint driven enforcement process for the protection of workers. See 137 Cong. Rec. S18243 (daily ed. November 26, 1991) (statement of Senator Simpson); 137 Cong. Rec. S18245 (daily ed. November 26, 1991) (statement of Senator Kennedy). Consistent with both of these purposes it is important to broadly define who may file complaints, and thereby initiate investigations. See 58 Fed. Reg. 52157 (October 6, 1993) (Preamble to Proposed Rules, on regulatory language pertaining to employee notice, and on defining "Aggrieved" and "Interested" parties).

Next, the Union correctly argues that the complaint is untimely to challenge the labor condition application filed by Respondent on January 9, 1992. Section 1182(n)(2)(A) of the INA states that complaints will not be investigated unless they are filed not later than 12 months after the date of the failure or misrepresentation. See also 29 C.F.R. §507.805(c)(5). In this case the complaint was filed on April 29, 1993, more than 12 months after the labor condition application was filed on January 9, 1992. Accordingly, this allegation of the complaint is dismissed and will not be addressed herein.[4]

I must now consider whether Respondent complied with the statutory and regulatory requirements for filing labor condition applications for H-1B visas. On review of the evidence and the arguments of the parties on this issue, I agree with the ALJ's finding that Respondent failed to notify the bargaining representative as required under the Act and regulations and, further, that Respondent's labor condition statements misrepresented this fact.

The burden is on the employer to develop documentation to prove the validity of its statements in the labor condition application. 29 C.F.R. § 507.705(c)(5). Here, TCI failed to present evidence sufficient to satisfy that burden before the ALJ. At the hearing Vice-President Edward Let f admitted a failure to notify the bargaining representative of the labor condition application filings. T.

---

[4] Because the ALJ concluded that no penalty was warranted with respect to this allegation, any error in considering this violation was harmless.

at 27. Moreover, in a letter dated July 20, 1993, from Edward Leff to the ALJ, he stated that "TCI unknowingly did not notify the collective bargaining unit of applications of H-1B visas...." At the hearing, Respondent's counsel asserted that Mr. Leff was verbally amending that statement and asserting that there was no violation, Tr. at 59-60, even though Mr. Leff earlier in the same hearing reiterated his failure to notify.

Additionally, the Union's letter of July 29, 1993, drafted by Susan Lyons, Recording Secretary, in response to Complainant's inquiry states that, "This letter responds to your question about when TCI notified the union of instructors with H1-B visas. To the best of my recollection, we received documents from the College concerning applications for H1-B visas in March of 1993... This was the first time we received such documents." Union representatives testifying at the hearing consistently indicated no knowledge of labor condition application filings or of hiring of nonimmigrants. Accordingly, despite the Union's assertions before me now, that Respondent provided sufficient notice of its labor condition applications in meetings in 1991, and that the Union was aware of the H-1B status of employees within TCI and the terms of their employment, I find that Respondent failed to provide the requisite notice of the challenged labor condition applications, and that these labor condition applications contained a misrepresentation of a material fact. Additional evidence and arguments concerning Respondent's motivation and intent in committing these violations, and the harm which resulted from the violations, are more properly considered in determining appropriate sanctions for the established violations.

Although I agree with the ALJ's findings that Respondent's misrepresentations in the latter two labor condition applications violate the Act and regulations governing the H-1B visa program, I disagree with the ALJ's dicta concerning the purposes of the labor condition application requirements, and the statutory and regulatory framework of the H-1B nonimmigrant visa program.

Addressing Complainant's allegations that she was laid off because of the improper employment of nonimmigrants under the H-1B visa program, the ALJ made statements concerning the impropriety of employers hiring H-1B nonimmigrants to displace U.S. workers, and the failure of the Act and regulations to provide a remedy for such displaced U.S. workers. The ALJ also speculated that "Respondent stated that the violations were inadvertent, although it seems more likely to me that it knew the union would probably object if it found out about the applications." R.D. and O. at 4.

Contrary to Complainant's assumptions, however, the H-1B visa program does not require an employer to show that U.S. workers are not available for the positions which the nonimmigrants are being hired to fill.[5] The intent of the labor condition application provisions was to protect the wages and working conditions of H-1B workers, and thereby, also protect the wages and working

---

[5] Other INA visa programs governing the hiring of foreign workers do contain such a requirement, e.g. H-lA visa for foreign nurses, and H-2B for foreign agricultural workers. Both the Union arid Respondent correctly point out that the ALJ and Complainant apparently confuse the labor condition statement requirements for H-1B visas and the labor certification requirements imposed in other INA employment based visa programs. The labor certification requirement necessitates a finding that sufficient U.S. workers are not available for the position. No such requirement was included in the H-1B program.

conditions of U.S. workers similarly employed. These provisions do not prohibit or prevent employers from hiring H-1B workers where U.S. workers are available and are not intended to remedy Complainant's layoff.[6] Accordingly, this case need not be remanded to the Administrator for further consideration of remedies available to this individual Complainant.

Remedies

Under Section 1182(n) (2) (C) of the INA, the Secretary may impose penalties as follows:

> If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1) (B), a substantial failure to meet a condition of paragraphs (1) (C) or (1) (D), a wilful failure to meet a condition of paragraph (1) (A), or a misrepresentation of material fact in an application-- (i) the Secretary shall notify the Attorney General of such finding and may in addition, impose such other administrative remedies (including civil money penalties in an amount not to exceed $1,000 per violation) as the Secretary determines to be appropriate, and (ii) the Attorney General shall not approve petitions filed. " (emphasis added)

The implementing regulations on remedies are found at 29 C.F.R. §507.810, and state that upon determining that the employer has committed any violation(s) described in 507.805(a) of this part, the Administrator may assess a civil money penalty not to exceed $ 1,000 per violation. In the instant case, it has been determined that Respondent violated Section 507.805(a)(4), "Substantially failed to provide notice of the filing of the labor condition application as required in 507.730(h) of this part" and Section 507.730(a)(1), "Filed a labor condition application with ETA which misrepresents a material fact."

Considering the nature of the two violations in this case and the other relevant factors enumerated at 507.810(c), I am persuaded to reduce the amount of the civil money penalty assessed against Respondent. As the ALJ found, Respondent has no history of violations, a minimal number of workers were potentially affected by the violation, there was no financial gain to Respondent and no demonstrated financial loss or injury to any other party as a result of the failure to notify the union of the labor condition applications, and Respondent has committed to future compliance. Additionally, it is plausible that Respondent acted without the intent to violate the provisions at issue here. In light of these factors, and considering the misunderstanding of the ALJ and Complainant as to the nature of the Act and its purposes at the time of the hearing, I find that a $250 civil money penalty for each violation is appropriate in the circumstances presented here. Ameliorating factors notwithstanding, effective enforcement of the Act is essential to ensure the effectiveness of the labor condition application process and the H-1B visa program. Accordingly, although a civil money penalty is not mandatory, I believe it is appropriate to ensure the viability of the complaint process and future compliance with the Act. Respondent is ordered to pay a total of $500 for the violations committed.

---

[6] I make no findings herein as to whether Complainant's layoff resulted from new hiring of H-1B nonimmigrants or the extension of H-1B nonimmigrant visas, as this issue is irrelevant to the matter properly before me for consideration, i.e. violation of the notice requirement of labor condition application procedures.

Section 507.855 governs "Notice to Employment and Training Administration and the Attorney General." Pursuant to 8 U.S.C. § 1182(n)(2)(C) and 29 C.F.R. § 507.855(a)(2), the Administrator properly notified the Attorney General and ETA of the ALJ's finding of a violation by Respondent.[7] Under 507.855(b), the Attorney General upon receipt of such notification, shall not approve petitions filed with respect to that employer during a period of at least one year. Under 507.855(c), ETA shall suspend the employer's labor condition applications upon such notification.

Accordingly, for the reasons discussed herein, the allegation concerning the labor condition application of January 9, 1992 is dismissed, and Respondent must remit a civil money penalty in the amount of $500 by certified check made payable to the "Wage and Hour Division, Labor."

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[7] Review of the comments made by Senators Kennedy and Simpson on November 26, 1991, in presenting their amendments to the H-1B visa program, while supportive of the position urged by the Union and Respondent that debarment is too harsh a sanction, do not persuade me that this result is incorrect. Both Senators comments on the need to distinguish between an employer's wilful failure and an inadvertent, good faith failure, when determining remedies, specifically refer to wage rates and working conditions in subparagraphs (1) (A) (i) or (ii). 137 Cong. Rec. S18243-S18245 (daily ed. Nov. 26, 1991) (statements of Senators Simpson and Kennedy). These comments are not inconsistent with my reading of the plain language of the INA and the regulations which dictate the result reached herein.